In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 798

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, PETITIONER

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONER

In their briefs in opposition, respondents argue that the decision below may be sustained on an alternative ground—that the Comptroller could be enjoined from issuing a certificate to Whitney-Jefferson because its operation would be in violation of a State law prohibiting the operation of bank holding companies. The statutory bases of the respondents' argument are Louisiana Act No. 275 of 1962 (set out at p. 34 of our petition), which makes it unlawful for any bank holding company "to open for business any bank not now open for business," and Section 7 of the Bank Holding Company Act of 1956, which provides that the enactment by Congress of that Act

725-105—64

"shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof." 12 U.S.C. 1846. This contention does not provide a ground for a denial of certiorari in this case for several independent reasons.

A. First, the contention that the Comptroller could not properly issue a certificate to Whitney-Jefferson (and therefore can be enjoined from doing so) because of the prohibitions of State law is, for two reasons, erroneous.

1. The Comptroller of the Currency is charged with certifying that a proposed bank has complied with the provisions of the National Bank Act and is therefore enfitled to operate as a national bank. It is no part of his functions to certify that the proposed bank has complied with all provisions of State law, if indeed such provisions can be applied to national banks at all. The federal banking statutes do, on occasion, direct the Comptroller of the Currency to apply, *as a rule of federal law,* various State statutes such as State prohibitions on the location of branch offices. But it is only those State provisions which are incorporated as matters of federal law that the Comptroller is to consider.[1] His certificate is a certificate

[1] One of the respondents apparently suggests that the National Bank Act itself refers to and incorporates State law (Brief for Louisiana State Bank Commissioner, pp. 18–19). Any such suggestion is untenable, because in context the phrase "lawfully entitled to commence the business of banking" is the equivalent of compliance "with all the provisions" of the National Bank Act "required to entitle it to engage in the business of banking." R.S. §§ 5168, 5169, 12 U.S.C. 26, 27, Pet. pp. 27–28.

of compliance with federal law, and that alone (J.A. 311). There is no provision of federal law which states that a new bank shall not be certified as in compliance with federal law if its opening is prohibited by a State statute.

It is therefore clear that the Comptroller of the Currency is not authorized, much less required, to determine the applicability of State statutes before certifying compliance with federal law and authorizing the national bank to begin operation. To the extent that State statutes could constitutionally be applied to a national bank or its stockholders, they would have to be applied in direct proceedings by State officials against these parties. Indeed, even if the Comptroller were to consider the applicability of a particular State statute, his *ex parte* determination would not be binding on the State courts or on the State enforcement officials. The Louisiana statute itself, as the court of appeals noted, purports to outlaw the opening of a national bank even if the Comptroller of the Currency has already issued the certificate of authority to commence the business of banking. Accordingly, an issue of violation of a State law which is not incorporated in the federal statute cannot form the grounds for an injuction against the Comptroller of the Currency.

2. The Louisiana statute, in any event, cannot constitutionally be applied to prohibit the opening and operation of national banks. National banks are, of course, instrumentalities of the Federal Government (*Mercantile Nat. Bank at Dallas* v. *Landeau*, 371 U.S.

555, 558), created by federal law (the National Bank Act), to serve vital federal purposes. *Franklin National Bank* v. *New York,* 347 U.S. 373, 375. Consonant with the need for a sound, uniform national banking system, the Act confers on national banks all the powers necessary to engage in the business of banking, and sets forth standards of federal law to determine when a national bank has been properly organized, and whether it is entitled to commence the business of banking. R.S. §§ 5136, 5168, and 5169, 12 U.S.C. 24, 26, and 27, Pet. pp. 27–28. State law has no role in this determination. As this Court has said, "The National Bank Act constitutes 'by itself a complete system for the establishment and government of National Banks'." *Deitrick* v. *Greaney,* 309 U.S. 190, 194; *Cook County Nat. Bank* v. *United States,* 107 U.S. 445, 449.

The terms of the National Bank Act must, of course, prevail over any State statute which is in conflict with them, or which interferes with or impairs the ability of national banks to perform their federal duties. *Franklin National Bank* v. *New York,* 347 U.S. 373; *Mercantile Nat. Bank at Dallas* v. *Landeau,* 371 U.S. 555, 558–559. Sec. 3(5) of Louisiana Act 275 of 1962 purports to make it unlawful for any bank owned by a bank holding company "to open for business, whether or not, a charter * * * or certificate * * * has already been issued" permitting it to do so. La. R.S. 6:1003, Pet. p. 34. If applied

to national banks,[2] the State law purports to take away exactly what is granted by the applicable provisions of the National Bank Act (R.S. §§ 5136, 5168, 5169, 12 U.S.C. 24, 26, and 27), namely the authority to commence and engage in the business of banking. Indeed, it would be difficult to conceive of State legislation which more effectively interferes with the ability of national banks to discharge their federel duties than a statute which purports to prevent them from opening their doors. Unless by some subsequent legislation Congress granted the States authority to override the provisions of the National Bank Act, therefore, Sec. 3(5) of the Louisiana Act is in conflict with those provisions, and cannot apply to prevent the opening of a national bank. *Mercantile Nat. Bank at Dallas* v. *Landeau,* 371 U.S. 555, 558–559.

Respondents rely upon Sec. 7 of the Bank Holding Company Act of 1956 (12 U.S.C. 1846) as granting the States such authority. But that section merely provides that the enactment of the 1956 statute should "not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof." The section was intended to preserve existing State authority in regard to State-chartered banks which, like national banks, were subject to the Act. It adds nothing to the powers of the States over national

[2] Although the Louisiana Act does not in terms apply to national banks, the context in which it was passed supports the view that it was intended to apply to them. The Act would be consonant with federal law if read narrowly to apply only to State banks.

banks; it merely negates any inference of preemption in the regulation of State-chartered banks that might otherwise arise from "the enactment by the Congress of this chapter * * *." The legislative history of Section 7 makes this absolutely clear. The Senate Report (Sen. Rept. 1095, Part 2, 84th Cong., 2d Sess., p. 5; 102 Cong. Rec. 6758 states:

> In order to clarify the legislative history of section 7, the committee wishes to emphasize that this section does not grant any new authority to States over national banks. The purpose of the section is to preserve to the States those powers which they now have in our dual banking system.[3] * * *

It is thus clear that Section 7 of the Bank Holding Company Act of 1956 does not grant the States a power they previously lacked—the power to prohibit the opening of a national bank. This Court's dismissal for want of a substantial federal question of the appeal in *Braeburn Securities Corp.* v. *Smith*, 15 Ill. 2d 55, 153 N.E. 2d 806, is not a holding to the contrary. Unlike Sec. 3(5) of Louisiana Act 275 of 1962, the State statute involved in that case contained no provision prohibiting a national bank owned by a bank holding company from opening for business and the appellant, accordingly, asserted no conflict between the State statute and the National Bank Act (which he did not even cite). The Illinois case thus did not present the issue of conflict between State law and the National Bank Act which is at the heart of the present case.

[3] See also, Sen. Rept. 1095, Part 1, 84th Cong., 1st Sess., pp. 10-11.

B. Respondents' contentions based upon Louisiana Act 275 of 1962 do *not* provide an alternative basis for sustaining the judgment of the court of appeals without reaching the first question presented by our petition for certiorari. We there stated (Pet. 12):

> * * * The jurisdictional question presented by this case is whether competitor banks must raise, in the established administrative proceedings before the Federal Reserve Board, all objections to the transaction upon which the Board is authorized to pass or may attack the transaction, after the Comptroller has recommended its approval and the Board has approved it, by a suit for an injunction brought against the Comptroller of the Currency. It is our contention that persons opposing the acquisition and operation of the new subsidiary must present to the Federal Reserve Board objections which can be raised before that agency, and that they are bound by its decision subject only to review in the reviewing court of appeals.

The nature of respondents' contention in the present case supports our position in this regard. A suit against the Comptroller is not the proper forum for determining the applicability and effect of State law under the Bank Holding Company Act of 1956. It is apparent that the question whether the Bank Holding Company Act of 1956 authorizes States to prohibit a bank holding company from opening a national bank subsidiary should be resolved before the forum (the Federal Reserve Board) and by the procedure specified by that Act, and should be reviewed in a judicial proceeding in which the Board is a party—

not in a collateral proceeding against the Comptroller of the Currency.*

C. There are, finally, two additional reasons why the respondents' reliance upon State law as an alternative ground for affirmance does not affect the importance of Supreme Court review in this case.

1. The decision of the court below is bottomed on federal statutory grounds which are applicable to the acquisition and operation of national banks by holding companies in every State; the impact of the decision will not be limited to States where a State statute, such as that of Louisiana, prohibits the opening of national banks by holding companies. Since, as we have pointed out in our petition, suits for an injunction against the Comptroller of the Currency and proceedings for direct review of Federal Reserve Board decisions under the Bank Holding Company Act may always be brought in the District of Columbia Circuit, the decision below, unless reversed, will remain a precedent which controls an important aspect of banking operations throughout the country. For this reason, it is of substantial importance to the banking industry and its regulatory agencies that the grounds of the court's decision be reviewed by this Court.

2. Although the alternative ground of State law set forth by the respondents is of less general application than the federal statutory ground on which the decision below is based, the questions as to the ap-

* This is, of course, in no way affected by the fact that Louisiana did not pass the statute on which respondents rely until after the Federal Reserve Board had approved the Whitney program.

plicability of State law are, if reached by this Court, themselves worthy of review. As we have pointed out above, we do not believe that a State may constitutionally prohibit the opening and operation of a national bank. There is, moreover, grave doubt as to the extent to which States may control the ownership of the stock of national banks by holding companies.

CONCLUSION

For the reasons set forth above, and in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.[*]

ARCHIBALD COX,
Solicitor General.
MORTON HOLLANDER,
DAVID L. ROSE,
Attorneys.

MARCH 1964.

[*] In this Court respondents have sought to raise, for the first time, antitrust considerations of undue concentration of banking power and monopoly (Brief for Louisiana State Bank Commissioner, p. 13; see Brief for Respondent Banks, p. 5). The proposal approved by the Federal Reserve Board did not involve a merger with, or acquisition of, a competing banking institution. Accordingly, as the Board found, the Whitney proposal would not increase the concentration of New Orleans banking business in Whitney banks (J.A. 104–105). Indeed, that proposal is wholly consonant with the Congressional policy of fostering growth through internally generated expansion, rather than by acquisition of existing institutions. *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 370. The Antitrust Division of the Department of Justice did not oppose the Whitney proposal before the Federal Reserve Board (as is its practice when it believes there is a serious question of possible antitrust violations), and the Board itself found that approval of the plan would tend to strengthen banking competition (J.A. 102, 105–106).

U.S. GOVERNMENT PRINTING OFFICE: 1964